

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

NEAL A. CUPERSMITH, *et al.*,

Plaintiffs,

-vs-

3:14-CV-1303
(TJM/DEP)

PIAKER & LYONS, P.C., *et al.*,

Defendants.

**Thomas J. McAvoy,
United States District Judge**

DECISION and ORDER

This matter was referred to the Hon. David E. Peebles, United States Magistrate Judge, for a Report and Recommendation pursuant to 28 U.S.C. § 636(b) and Rule 72.3(d) of the Local Rules of the Northern District of New York in this case involving claims of financial fraud against the Defendants.

Magistrate Judge Peebles recommends that the Court grant the Defendants' cross-motion for sanctions and dismiss the claims of Macon L. Nixon, Audrey E. Nixon, Barry DeSantis and Jeanne A. DeSantis because they have refused to appear for depositions despite knowledge that failing to appear could result in sanctions, including dismissal.

Plaintiffs filed timely objections to the Report-Recommendation pursuant to 28 U.S.C. § 636(b)(1). When objections to a magistrate judge's Report-Recommendation are lodged, the Court makes a "*de novo* determination of those portions of the report or specified proposed findings or recommendations to which the objection is made." See 28 U.S.C. §636(b)(1). After such a review, the Court may "accept, reject, or modify, in whole

or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.” Id.

Having reviewed the record *de novo* and having considered the issues raised in the Plaintiffs’ objections, this Court has determined to accept the recommendation of Magistrate Judge Peebles for the reasons stated in the Report-Recommendation.

Plaintiffs also timely objected to Magistrate Judge Peeble’s order awarding attorneys fees and costs to the Defendants pursuant to Federal Rule of Civil Procedure 37 for the costs of preparing their cross motion and the costs of preparing for the depositions in question. Though styled as an “objection,” the Court will construe Plaintiffs’ filing as an appeal of a non-dispositive order from a magistrate judge, as that part of Magistrate Judge Peebles’ decision was an order, not a recommendation to this Court. It also concerned an issue that did not potentially dispose of the case.

A district court judge reviewing a magistrate judge’s non-dispositive pretrial order may not modify or set aside any part of that order unless it is clearly erroneous or contrary to law. Labarge v. Chase Manhattan Bank, N.A., 1997 U.S. Dist. LEXIS 13803, 1997 WL 5853122, at *1 (N.D.N.Y. Sept. 3, 1997) (citing 28 U.S.C. § 636(b)(1)); FED. R. CIV. P. 72(a); Mathias v. Jacobs, 167 F.Supp.2d 606, 621-23 (S.D.N.Y. 2001); Dubnoff v. Goldstein, 385 F.2d 717, 721 (2d Cir. 1967) (court’s decision “not to disqualify himself is ordinarily reviewable only upon appeal from a final decision on the cause in which the application . . . was filed.”). Findings are clearly erroneous when the reviewing court is firmly convinced the lower court decided an issue in error. Lanzo v. City of New York, 1999 U.S. Dist. LEXIS 16569, 1999 WL 1007346, *2-3 (E.D.N.Y. Sept. 21, 1999). This

standard imposes a heavy burden on the objecting party, and only permits reversal where the district court determines the magistrate judge “abused his broad discretion over resolution of discovery matters.” Labarge, 1997 U.S. Dist. LEXIS 13803, 1997 WL 583122 at *1.

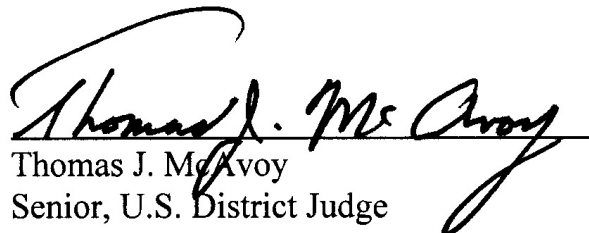
The Court finds no clear error or finding contrary to law in Magistrate Judge Peebles’ decision to award attorneys fees to Defendants as a sanction for Plaintiffs’ refusal to appear at depositions concerning the case they filed. Plaintiffs’ appeal of that non-dispositive order will therefore be dismissed.

Accordingly, the Report and Recommendation of Magistrate Judge Peebles is hereby ADOPTED, and:

1. The Defendants’ cross-motion for sanctions, dkt. # 87, is hereby GRANTED;
2. The claims of Plaintiffs Macon L. Nixon, Audrey E. Nixon, Barry DeSantis and Jeanne A. DeSantis are hereby dismissed based upon their failure to appear for deposition; and
3. Plaintiffs’ appeal of Magistrate Judge Peebles’ non-dispositive order awarding costs and attorneys fees to the Defendants is hereby DISMISSED.

IT IS SO ORDERED.

Dated: February 5, 2016


Thomas J. McAvoy
Senior, U.S. District Judge